UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1224

LUCAS P. BAEZ,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Entered Dec. 6, 1994.

Before SELYA, CYR and STAHL, Circuit Judges.

SELYA, Circuit Judge.

Petitioner Lucas P. Baez, also known as Lucas Porfirio Baez-Soto, also known as Domingo Guzman, an alien who was deported following a state narcotics conviction, attempts to challenge the refusal of the Board of Immigration Appeals (BIA or Board) to reopen its decision to deny him a waiver of deportability. Petitioner's case requires this court to make its initial interpretation of the jurisdictional bar contained in the departure clause of section 106(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1105a(c)(1988).[1] The

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[1] The statute provides in material part that "[a]n order of deportation ... shall not be reviewed by any court if the alien ... has (continued...)

courts of appeals have divided on whether this statute signifies what it appears to say. We conclude that the statute's plain meaning must prevail, and, therefore, an alien's departure from the United States, whether voluntary or involuntary, deprives the federal courts of jurisdiction to entertain challenges to an antecedent order of deportation. Because the instant petition solicits judicial inquiry into the correctness of the deportation order that brought about petitioner's departure, we dismiss it for want of appellate jurisdiction.

I. BACKGROUND

Petitioner is a native and citizen of the Dominican Republic. He lawfully entered the United States as a child in 1972. In 1986, he was convicted in a Massachusetts state court of distributing cocaine, and received a five-to-ten-year incarcerative sentence. An alien's commission of a serious drug offense invites deportation. See 8 U.S.C. § 1251(a)(11)(1988); see also 8 U.S.C.A. § 1251(a)(2)(B)(i) (West Supp. 1994) (current version). Adhering to the statutory scheme, the Immigration and Naturalization Service (INS) issued an order asking petitioner to show cause why he should not be deported.

Following petitioner's release from prison in 1988, an immigration judge (IJ) held a hearing on the show-cause order. Under section 212(c) of the Act, 8 U.S.C. § 1182(c), a lawfully admitted resident alien domiciled in this country for no fewer than seven years who has been convicted of a drug offense may secure relief from deportation on the basis of that conviction if the Attorney General determines that a waiver appears to be in the national interest because social and humane considerations

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[1](...continued)
departed from the United States after the issuance of the order." 8 U.S.C. § 1105a(c)(1988).

outweigh the adverse factors evidencing the alien's undesirability.[2] See *Gouveia v. INS*, 980 F.2d 814, 816-19 (1st Cir. 1992) (elucidating balancing test); *Matter of Marin*, 16 I. & N.Dec. 581 (BIA 1978) (similar). During the hearing, petitioner conceded deportability, invoked section 212(c), and requested a discretionary waiver. On June 16, 1989, the IJ issued a decision favorable to petitioner. The judge noted adverse factors, including petitioner's cocaine conviction and neglect of his children, but found those factors overbalanced by petitioner's extended residence, family ties, and the like.

The INS appealed the IJ's decision to the BIA. Under the briefing order applicable to its appeal, the INS had until August 23, 1990, to file its brief, but the matter apparently fell between the cracks. On August 28, petitioner filed a motion to dismiss the appeal with the IJ. The INS responded by serving the wayward brief the next day and, shortly thereafter, submitting its formal opposition to the dismissal motion. In early September, petitioner, apparently realizing belatedly that his motion should have been filed with the BIA rather than the IJ, refiled it with the BIA. After an unexplained three-year lull, the BIA issued an order on September 30, 1993, in which it reversed the IJ's decision, denied petitioner's request for a waiver, and ordered him deported.

On November 22, 1993, at 11:15 p.m., Paul F. Murphy, counsel of record for the petitioner, received a telephone call from petitioner's sister informing him that the INS had taken

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[2] The Attorney General has duly delegated this power to her subordinates within the INS apparatus, with the proviso that applications "for the exercise of discretion under section 212(c) of the Act shall be submitted ... to: (1) the [appropriate regional] director...; or (2) the Office of the Immigration Judge...." 8 C.F.R. § 212.3(a)(1994).

petitioner into custody that day and intended to deport him posthaste. Attorney Murphy claims that, as of that moment, he did not know of the Board's September 30 decision. The next day, the lawyer moved to stay deportation and reopen the proceedings. He filed these motions at the IJ's chambers in Boston. Early that afternoon, the motions were forwarded to the BIA's office in Falls Church, Virginia. At 2:00 p.m., Attorney Murphy telephoned the BIA and supplied an oral statement in order to facilitate immediate review of the motion to stay deportation. At 4:30 p.m., the BIA notified Attorney Murphy that it had denied the stay because the single member who considered the matter found that the motion to reopen had little likelihood of success.[3]

The INS deported petitioner on November 24, 1993. On December 13, in pursuance of the applicable regulation, 8 C.F.R. § 3.2 (1994), the BIA effectively denied petitioner's motion to reopen, deeming it to be withdrawn by virtue of his deportation. On March 10, 1994, petitioner sought judicial review of the "denial" of his motion to reopen. See 8 U.S.C.A. § 1105a (West 1970 & Supp. 1994) (prescribing the procedure for review of final deportation orders in the courts of appeals); see also *Giova v. Rosenberg*, 379 U.S. 18, 18, 85 S. Ct. 156, 156, 13 L.Ed.2d 90 (1964) (per curiam) (holding that the BIA's denial of a motion to reopen a deportation proceeding

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[3] Petitioner did not seek judicial review of the BIA's order within the time then allotted by statute, see 8 U.S.C.A. § 1105a(a)(1) (West Supp. 1994) (providing that petitions for judicial review of such orders must be filed within 90 days); see also *infra* note 4, despite the fact that the time for doing so had not yet expired. By the same token, petitioner did not seek a stay from this court.

is a judicially reviewable final order). The petition appears to have been filed within the time span fixed by statute.[4]

II. THE PROFFERS ON APPEAL

An INS regulation provides in pertinent part that "[t]he decision of the [BIA] shall be in writing ... and a copy shall be served upon the alien or party affected as provided in part 292 of this chapter." 8 C.F.R. § 3.1(f) (1994). The cross-referenced regulation stipulates that service may be effected by mail upon "the attorney or representative of record, or the person himself if unrepresented." 8 C.F.R. § 292.5(a) (1994). At all times material hereto, Murphy was petitioner's attorney of record. He claims not to have received timeous notice of the

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[4] In 1990, Congress amended 8 U.S.C. § 1105a(a)(1) to reduce to 30 days the period within which an alien convicted of certain aggravated felonies on or after November 18, 1988 might petition or judicial review. See Immigration Act of 1990, Pub.L. No. 101-649 § 502(a), 104 Stat. 4978 (1990). Because petitioner's conviction occurred in 1986, he had 90 days, rather than 30, within which to file his petition in this court, see *id.* at § 545(b)(1). INS nevertheless argues that, because the petition to review was not filed within 90 days of the date of the deportation order (September 30, 1993), this court lacks jurisdiction to review that decision. INS's view is problematic. Compare *Fleary v. INS*, 950 F.2d 711, 713 (11th Cir. 1992) (reaching opposite conclusion after considering 1990 amendments to the Act) and *Fuentes v. INS*, 746 F.2d 94, 97 (1st Cir. 1984) (similar; considering earlier version of the Act) with *Stone v. INS*, 13 F.3d 934, 936-39 (6th Cir. 1994) (*contra*; considering 1990 amendments) and *Nocon v. INS*, 789 F.2d 1028, 1032-33 (3d Cir. 1986) (same; considering earlier version of the Act). We need not probe this point, for even if INS is correct in its view—a matter on which we do not pass—it has not argued that the petition for review is untimely as to the Board's jettisoning of the motion to reopen.

BIA's September 30 decision. Desiring to shed light on this factual issue, we authorized the parties to submit fact-specific proffers anent the notification issue. See *Bemis v. United States*, 30 F.3d 220, 222 & n. 2 (1st Cir. 1994) (authorizing factual proffers on appeal).

Petitioner submitted an affidavit signed by Attorney Murphy's secretary, Montsie Moreno, stating that she sorted the lawyer's mail during October of 1993, but did not receive a copy of the BIA's decision in that time frame. For its part, the INS submitted two sworn declarations. The declaration of April M. Verner, supervisory case management analyst of the BIA's Docket Unit, certified, based on her knowledge of BIA procedure and the record of the case, that a copy of the BIA's September 30, 1993 decision had been mailed contemporaneously to Attorney Murphy at 6 Faneuil Hall Marketplace, Boston, MA 02109 (which was counsel's address of record as indicated on BIA Form EOIR-27, dated September 7, 1990).

The second declaration dovetails with Verner's statement but goes on to strike a somewhat different chord. In it, Judith E. Arnott, the Boston-based INS officer who made the arrangements for petitioner's deportation, observed that a copy of Form I-294 (the official notice of the country to which a particular individual's deportation is directed) had been mailed to Attorney Murphy at his address of record shortly after petitioner's deportation, and that the mailing was returned to the INS on December 7, 1993, marked "forwarding time expired." Ms. Arnott added that neither petitioner nor his representative, Attorney Murphy, ever requested the district director to stay petitioner's deportation.

The parties filed no further proffers. At oral argument, however, Attorney Murphy advised that he continued to maintain an office at 6 Faneuil Hall Marketplace and implied

that he had never arranged to have mail forwarded from that address. Nevertheless, he conceded that, in the fall of 1993, his principal offices were located elsewhere, and the Faneuil Hall office was checked for mail at infrequent intervals (perhaps twice a week).

III. ISSUES PRESENTED

Petitioner contends that several errors infected the process leading to his deportation. First, he asseverates that the INS's failure punctually to file its brief deprived the BIA of jurisdiction to hear the initial appeal, and, consequently, that the IJ's decision upholding petitioner's entitlement to a section 212(c) waiver became final agency action (or, put another way, that the BIA's reversal of the IJ's ruling had no force or effect because the BIA's jurisdiction had been pretermitted). Second, petitioner asseverates that, in violation of applicable statutory and administrative rules, the BIA did not properly notify his counsel of its September 30 decision and, therefore, deported petitioner without requisite notice. See, *e.g.*, 8 C.F.R. § 243.3(b) (1994) (providing that a deportation order "shall be executed no sooner than 72 hours after service of the decision").

We are powerless to reach the merits of these asseverations, however, for petitioner's deportation deprives this court of subject matter jurisdiction over the request for judicial review.

IV. ANALYSIS

Section 106(c) of the Act, 8 U.S.C. § 1105a(c), quoted supra note 1, is absolute on its face. It stipulates that a deportation order "shall not be reviewed by any court" once the alien has departed. This flat rule is couched in obligatory terms that reflect Congress's determination to eliminate repetitive and unjustified appeals. See H.R.Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2950, 2971-72.

Despite the unambiguous language of the statute, some courts, presumably troubled by its rigidity, have read exceptions into it, thereby softening its impact and authorizing post-deportation judicial review under certain circumstances. The Ninth Circuit pioneered this view in *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977). There, an alien who had been deported without notice to his counsel, on the basis of a sentence that had been vacated prior to deportation, pressed forward with a petition for judicial review of the deportation order. The court entertained the petition and ordered the alien readmitted to the United States. See *id.* at 959. In reaching this result, the court read section 1105a(c) as a conditional, rather than an absolute, bar, opining that "'departure' in the context of 8 U.S.C. § 1105a cannot mean 'departure in contravention of procedural due process.'" *Id.* at 958. On this basis, the court held that "'departure' means 'legally executed' departure when effected by the government." *Id.*

Since the first seed was sown, the *Mendez* exception has mushroomed in the Ninth Circuit. Today, that court allows judicial review of deported aliens' claims in an array of situations. See, *e.g.*, *Zepeda-Melendez v. INS*, 741 F.2d 285, 287-88 (9th Cir. 1984) (entertaining petition on claim that deportation occurred without notice to counsel); *Thorsteinsson v. INS*, 724 F.2d 1365, 1367-68 (9th Cir.) (indicating that court would entertain petition on claim that deportation occurred through ineffective assistance of counsel), cert. denied, 467 U.S. 1205, 104 S. Ct. 2386, 81 L.Ed.2d 345 (1984); *Estrada-Rosales v. INS*, 645 F.2d 819, 820-21 (9th Cir. 1981) (entertaining petition on claim that deportation was based on invalid conviction).

Mendez has not fared as well outside its birthplace. To the limited extent that the decision has evoked admiration, its admirers have doused it with faint praise. A decade ago, the Sixth Circuit referred to the *Mendez* exception in approbatory

terms, but did not squarely adopt it, see *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984) (citing *Mendez* in connection with a discussion of an alien's administrative remedies), and to our knowledge has not revisited the question. More recently, a diluted version of the *Mendez* exception has been afforded safe passage in two other courts of appeals. See *Camacho-Bordes v. INS*, 33 F.3d 26, 27-28 (8th Cir. 1994) (hypothesizing that judicial review should be permitted, notwithstanding execution of a deportation order, if a "colorable" claim of a due process violation emerges); *Marrero v. INS*, 990 F.2d 772, 777 (3d Cir. 1993) (same).

At least three other circuits have given *Mendez* a distinctly unfavorable reception. In *Umanzor v. Lambert*, 782 F.2d 1299 (5th Cir. 1986), the Fifth Circuit professed "serious reservations" about the *Mendez* court's holding, and noted that it had become a "sinkhole that has swallowed the rule of § 1105a(c)." *Id.* at 1303 & n. 5. The Fifth Circuit expressly rejected *Mendez* in a subsequent case, explaining that section 1105a(c) was written in plain language that brooked no exceptions to the jurisdictional bar. See *Quezada v. INS*, 898 F.2d 474, 476-77 (5th Cir. 1990). The Tenth Circuit also adopted a strict interpretation of section 1105a(c), ruling that the statute's "unequivocal" language does not permit a *Mendez*-type exception to flourish. *Saadi v. INS*, 912 F.2d 428, 428 (10th Cir. 1990) (per curiam). The Second Circuit recently joined the lengthening anti-*Mendez* parade. See *Roldan v. Racette*, 984 F.2d 85, 90 (2d Cir. 1993) (observing that "[t]he pertinent language of § 1105a(c) constitutes a clear jurisdictional bar, and admits of no exceptions"). Still another court of appeals has signalled that it is skeptical of *Mendez*. See *Joehar v. INS*, 957 F.2d 887, 890 (D.C. Cir. 1992)

(declining to consider the *Mendez* exception in respect to an alien who had departed voluntarily).[5]

We reject the *Mendez* exception. Although *Mendez* itself presented a compelling case on its peculiar facts and the desire to afford relief is understandable on that plane, we believe the court's willingness to take liberties with the language of section 1105a(c) is mischievous and has produced bad law.[6] This straining, dubious at the time, has been rendered all the more suspect by recent Supreme Court opinions emphasizing the importance of a statute's text and plain meaning. See, *e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, ___, 112 S. Ct. 2589, 2594-95, 120 L.Ed.2d 379 (1992); *West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99, 111 S. Ct. 1138, 1146-47, 113 L.Ed.2d 68 (1991); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); see generally David L. Shapiro,

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[5] In *United States v. Mendoza-Lopez*, 481 U.S. 828, 107 S. Ct. 2148, 95 L.Ed.2d 772 (1987), the Supreme Court held that due process requires that collateral review of a deportation order be available in a subsequent criminal prosecution for unlawful reentry when substantial defects in the underlying administrative proceedings foreclosed direct judicial review. *Id.* at 838, 107 S. Ct. at 2155. In dissent, Justice Scalia suggested that the majority's opinion necessarily betokened a rejection of the *Mendez* holding. See *id.* at 849, 107 S. Ct. at 2161 (Scalia, J., dissenting). But Justice Marshall, writing for the majority, took pains to "express no view" on *Mendez*. *Id.* at 837 n. 13, 107 S. Ct. at 2154 n. 13. Thus, we take the majority's disclaimer at face value and treat the question as an open one.

[6] One is reminded of Lord Campbell's admonition that "it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law." *East India Co. v. Paul*, 7 Moo. 85, 111 (P.C.1849).

Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. REV.. 921, 921 & n. 2 (1992) (noting judicial efforts to narrow interpretation to coincide with the statutory text and citing recent examples). To embellish section 1105a(c) as *Mendez* suggests is to import ambiguity into words that are as unambiguous as ordinary linguistic usage permits. That approach is unacceptable, for it mutes the clarion call that Congress has sounded, and, in the bargain, muffles the Court's string of recent "plain meaning" cases.

We think that the proper approach to construing section 1105a(c) is to begin with the text of the statute and grant its words their ordinary meanings. See *Ardestani v. INS*, 502 U.S. 129, ___, 112 S. Ct. 515, 519, 116 L.Ed.2d 496 (1991); *Heno v. FDIC*, 20 F.3d 1204, 1207 (1st Cir. 1994); *United States v. Charles George Trucking Co.*, 823 F.2d 685, 688 (1st Cir. 1987). Beginning in this way brings our inquiry swiftly to a close, for the plain language of the statute prohibits judicial review of a deportation order once the order has been executed. There is certainly no slack in the command that the order "shall not be reviewed by any court." Having set out this command, the statute contains no mention that it is subject to any exceptions. And contrary to the *Mendez* court's view, 563 F.2d at 958, we do not believe that there is any principled way to interpret the word "departed" as failing to encompass the most relevant type of departures--involuntary departures by way of deportation. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 604 (1986) (defining "depart" to include "to go forth or away: set forth: LEAVE").

When Congress plainly marks a path, courts are seldom free to leave it and roam at will in the surrounding veldt. Section 1105a(c) falls within this general rule. Having found a clear meaning in the unvarnished language of the statute, we are duty bound to honor that meaning, not to alter it by applying a judicial gloss.

Of course, there are exceptions to this rule, such as when statutory language, though unambiguous, leads to results that are absurd or are diametrically opposed to the drafters' discernible intentions. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 575, 102 S. Ct. 3245, 3250, 3252, 73 L.Ed.2d 973 (1982); *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 701-02, 66 L.Ed.2d 633 (1981). But the terrain on which this statute rests is inhospitable to the cultivation of such an exception because the statute, read literally, yields a sensible result. On the whole, a literal reading helps promote Congress's intention to eliminate excessive appeals and lend finality to the deportation process. A judge-made exception to section 1105a(c)'s jurisdictional bar, even one limited to "colorable" due process claims--whatever that term may eventually come to mean--can too easily expand to engulf the general rule prohibiting review, see *Umanzor*, 782 F.2d at 1303 n. 5, and thereby thwart achievement of the congressional goal. We think it is elementary that a construction which emasculates a statute is not eagerly to be embraced.[7]

Nor can petitioner's professions of good faith make a significant difference. Although there is no evidence that Baez is seeking to abuse the appellate process, his individual circumstances are insufficient to protect him from the plain

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[7] Moreover, the strict construction that the language of the statute demands passes constitutional muster. Congress has broad discretion to restrict access to the lower federal courts. See *Ankenbrandt v. Richards*, ___ U.S. ___, ___, 112 S. Ct. 2206, 2212, 119 L.Ed.2d 468 (1992) (listing cases). Hence, we perceive no constitutional infirmity in the outright denial of appellate review following an alien's deportation. See *Roldan*, 984 F.2d at 90-91 (upholding constitutionality of § 1105a(c) as jurisdictional bar to habeas corpus); *Umanzor*, 782 F.2d at 1304 (same).

language of the statute. As we have noted before, "[t]hat the reasons for Congress's decision to adopt a particular rule may not be present in an individual case ... is no justification for failing to give effect to the rule in that case." *In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 832 n. 20 (1st Cir. 1990).

We add an eschatocol of sorts. Even if we were to acknowledge that some extreme situations, such as a knowingly unlawful deportation by the INS for the specific purpose of shortstopping an alien's right to review, might justify an exception to section 1105a(c)'s jurisdictional bar, petitioner's claims are not of this stripe. His case hinges on a pair of grievances. Insofar as it depends on INS's deviation from the briefing schedule, it is baseless; the BIA has wide discretion in administering compliance with briefing orders and determining the consequences of a late submission. See, *e.g.*, *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) (finding no error in BIA's discretionary decision to accept untimely brief from INS); see also 8 C.F.R. § 3.1(d)(1) (1994) (providing that "the Board shall exercise such discretion and authority ... as is appropriate and necessary for the disposition of the case"). Here, INS's six-day delay seems fribbling, and the BIA's decision not to vitiate the appeal on that ground strikes us as both reasonable and lawful.

Similarly, petitioner's other grievance does not indicate the need for heroic measures. The likely explanation of Attorney Murphy's failure to receive his copy of the BIA decision does not implicate purposeful scheming by the INS, but suggests the accidental misdelivery of properly addressed mail by the postal service--a vagary that plagues us all. And despite the late notification, Attorney Murphy still had time to present a motion for a stay of deportation to a member of the BIA. Once that motion was denied, he had open, but chose not to pursue, several other remedial avenues, including asking the district

director or a court for a stay of the deportation order. Under the circumstances, we do not think that petitioner has alleged the type of extreme unfairness that might warrant overriding the plain language of the statute.

V. CONCLUSION

We need go no further. We join those of our sister circuits that have followed the plain language of section 1105a(c) and found its jurisdictional bar to be absolute. Reading the statute in that manner, the petitioner's involuntary departure from the United States deprives us of jurisdiction to examine the correctness of either the underlying deportation order or the Board's disposition of the motion to reopen. Accordingly, the petition for judicial review is

Dismissed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1224

LUCAS P. BAEZ,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ORDER OF COURT

Entered July 25, 1994

Respondent has moved to dismiss the instant petition for review, contending that petitioner's intervening departure from the country deprives this court of jurisdiction. See 8 U.S.C. § 1105a(c). Petitioner argues in response that this court retains jurisdiction because of various procedural irregularities attending his deportation.

The courts have split on the question of whether § 1105a(c)'s jurisdictional bar is subject to a due process exception. See, *e.g.*, *Marrero v. INS*, 990 F.2d 772, 776-77 (3d Cir. 1993) (discussing cases); *Roldan v. Racette*, 984 F.2d 85, 89-90 (2d Cir. 1993) (same). Petitioner has addressed this issue in only cursory fashion; respondent has not done so at all. In turn, the two factors relied on by petitioner in this regard--the allegedly defective service of the Board's September 30, 1993 decision, and the alleged failure to notify counsel of petitioner's impending deportation--have not been adequately

developed on the present record. The circumstances surrounding service of the Board's decision have yet to be fully documented. And the parties have not addressed the issue of whether counsel's eleventh-hour notice of the scheduled deportation might trigger a possible exception to § 1105a(c)--a matter of some dispute. Compare, *e.g.*, *Zepeda-Melendez v. INS*, 741 F.2d 285, 288-89 (9th Cir. 1984) with, *e.g.*, *Umanzor v. Lambert*, 782 F.2d 1299, 1303-04 (5th Cir. 1986); see generally 3 C. Gordon & S. Mailman, *Immigration Law and Procedure* § 72.08[2][b], at 72-266 to 267 (1994).

The motion to dismiss is accordingly deferred to the panel scheduled to hear oral argument. The parties are directed to address the foregoing issues (along with any others they wish to raise) in their briefing. They may also submit, by affidavit or otherwise, any additional factual proffers they deem appropriate in support of their respective contentions. See, *e.g.*, *Bemis v. United States*, ___ F.3d ___, No. 93-2387, slip op. at 4 n.2 (1st Cir. 1994) (agreeing to consider proffers on appeal).

By the Court:

Clerk.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A30 889 704 - Boston

In re: LUCAS PORFIRIO BAEZ-SOTO a.k.a. Lucas P. Baez a.k.a. Domingo Guzman

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Paul F. Murphy, Esquire
28 Beacon Street
Chelsea, Massachusetts 02150

ON BEHALF OF SERVICE: Frank J. Crowley, Jr.
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] - Convicted of controlled substance violation

APPLICATION: Motion to reopen

ORDER:

PER CURIAM. The Immigration and Naturalization Service has advised the Board that the respondent was deported from the United States on November 24, 1993. Accordingly, the matter before the Board is withdrawn by operation of law. See 8 C.F.R. § 3.2 (1993).

IT IS ORDERED that the record be returned to the Office of the Immigration Judge without further action.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A30 889 704 - Boston Date: November 23, 1993

In re: LUCAS PORFIRIO *BAEZ*-SOTO

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Paul F. Murphy, Esquire
28 Beacon Street
Chelsea, MA 02150

APPLICATION: Stay of deportation

Counsel for the respondent has applied for a stay of deportation pending consideration by the Board of a motion to reopen. After consideration of all information, the Board has concluded that there is little likelihood that the motion will be granted. Accordingly, the request for a stay of deportation will be denied.

ORDER: The request for stay of deportation is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A30 889 704 - Boston Date: Sep. 30 1993

In re: LUCAS PORFIRIO BAEZ-SOTO a.k.a. Lucas P. Baez a.k.a Domingo Guzman

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Paul F. Murphy, Esquire
6 Faneuil Hall Marketplace
Boston, Massachusetts 02109

ON BEHALF OF SERVICE: Patricia M. B. Sheppard
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] - Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility pursuant to § 212(c) of the Act; 8 U.S.C. § 1182(c)

This matter comes before us by way of the appeal of the Immigration and Naturalization Service from the decision of the immigration judge dated June 16, 1989, finding the respondent deportable as charged but granting the respondent's application for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The Service has appealed. For the reasons outlined below, the decision of the immigration judge will be reversed and the respondent ordered deported to the Dominican Republic.

The respondent is a 33-year-old, unmarried, native and citizen of the Dominican Republic, who entered the United States as a lawful permanent resident on April 20, 1972. On March 5, 1987, the Immigration and Naturalization Service issued an Order to Show Cause charging him with deportability under section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), as an alien convicted of a crime involving a controlled substance. The order alleged, inter alia, that the respondent was convicted on May 21, 1986, in the Worcester County Superior Court, Massachusetts, for unlawful distribution of a controlled substance (cocaine), in violation of chapter 94C, Section 32A of the Massachusetts General Laws. The respondent was sentenced to a term of incarceration of 5 to 10 years, and released on October 19, 1988.

At his deportation hearing, the respondent, through counsel, conceded service of the Order to Show Cause and the truth of the allegations therein. The immigration judge found the respondent deportable under section 241(a)(11) of the Act; this finding has not been challenged on appeal. We find that deportability has been established by clear, unequivocal, and convincing evidence, as required by *Woodby v. INS*, 385 U.S. 276 (1966), and 8 C.F.R. § 242.14(a). See also *Matter of Barrett*, Interim Decision 3131 (BIA 1990). The issue on appeal is limited to whether relief from deportation is warranted under section 212(c) of the Act in the exercise of discretion.

Section 212(c) of the Act provides that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of 7 consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds for

exclusion enumerated in section 212(a) of the Act.[1] The grounds specified provide for the exclusion of aliens who, like the respondent, have been convicted of crimes involving controlled substances and are excludable under section 212(a)(11) of the Act.[2]

However, mere eligibility for a section 212(c) waiver does not automatically entitle the alien to such relief. Instead, the Attorney General, or her delegate, is required to determine, as a matter of discretion, whether a respondent merits the relief sought. The alien bears the burden of demonstrating that he warrants favorable consideration. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

The exercise of discretion in a particular case necessarily requires consideration of all the facts and circumstances involved. There must be a balancing of the adverse factors evidencing the alien's undesirability as a permanent resident against the social and humane considerations presented in his favor. This Board has enunciated several such factors to be considered in determining whether a respondent warrants

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[1] The respondent is eligible for the relief of waiver of inadmissibility under 212(c) even though he is in deportation proceedings and has not left or attempted to reenter the United States because he is a lawful permanent resident who has maintained a lawful unrelinquished domicile of more than 7 consecutive years. *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Gordon*, 17 I&N Dec. 389 (BIA 1980); *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976). Accord, *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981).

[2] Although not applicable to the instant case, the grounds for exclusion and deportation were revised and redesignated by sections 601 and 602 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5067 and 5077 (1990). See *Matter of Papazyan*, Interim Decision 3186 (BIA 1992).

section 212(c) relief. Among the factors deemed favorable to respondent are the presence of family ties within the United States, residence of long duration in this country, evidence of hardship to the alien and his family if deportation occurs, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to an alien's good moral character. *Matter of Marin*, *supra*, at 584-85.

Adverse factors include the nature and underlying circumstances of the deportation ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *Matter of Marin*, *supra*, at 584. As the negative factors grow more serious, it becomes incumbent upon the respondent to present additional offsetting favorable evidence in his behalf to show he warrants a favorable exercise of discretion. A respondent who has been convicted of a serious offense, such as an offense involving controlled substances, must demonstrate "unusual or outstanding" countervailing equities before a favorable exercise of discretion will be considered. *Id.* at 586.

The nature of the adverse factor or factors (*e.g.*, particularly serious criminal misconduct, or convictions involving controlled substances) may ultimately be determinative of whether section 212(c) relief is granted. Absent unusual or outstanding equities, relief will not be granted in the exercise of discretion in cases where there are particularly adverse factors present. However, the existence of such equities does not create a right to have the consequences resulting from serious criminal misconduct waived. Nor do such equities compel a grant of discretionary relief. *Matter of*

Cerna, Interim Decision 3161 (BIA 1991); *Matter of Edwards*, Interim Decision 3134 (BIA 1990); *Matter of Marin*, *supra*; see *Matter of Roberts*, Interim Decision 3148 (BIA 1991); *Matter of Wadrid*, 19 I&N Dec. 182 (BIA 1984); *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980); see also *Matter of Carrasco*, 16 I&N Dec. 195 (BIA 1977), aff'd on other grounds, *Carrasco-Favela v. INS*, 563 F.2d 1220 (5th Cir.).

With regard to the issue of rehabilitation, aliens who have recently committed criminal acts have a more difficult task in demonstrating rehabilitation and hence in showing that discretion should be exercised in their favor, but this does not preclude us from considering rehabilitation as a significant discretionary factor. See *Matter of Roberts*, *supra*; *Matter of Gordon*, 17 I&N Dec. 389 (BIA 1980); *Matter of Marin*, *supra*; see also *Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988); *Matter of Carrasco*, *supra*. While a section 212(c) waiver applicant who has a criminal record may be required to make a showing of rehabilitation before relief will be granted as a matter of discretion, a clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion in every case involving an alien with a criminal record. Rather, section 212(c) applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. *Matter of Edwards*, *supra*; see *Matter of Roberts*, *supra*.

In the matter presently before us, the record contains evidence of a number of very serious adverse factors. We note initially, the conviction which forms the basis of deportability; the respondent's 1986 conviction for trafficking in cocaine.

Furthermore, the record reveals that the respondent was the subject of a complaint in 1984 alleging failure to pay child support for his two children born to a woman with whom he lived for approximately seven to eight years. The respondent

admitted that he failed to pay adequate child support, that the children and their mother received public assistance, including those periods of time when the respondent resided with them. Court documents indicate that the respondent has had his wages garnished in amounts to cover both arrearages and current support.

The record also reveals that the respondent has a prior arrest in 1984 charging him with possession of cocaine with intent to distribute. The criminal complaint was amended on May 17, 1984, to simple possession of a controlled substance, and the respondent was charged with a violation of Massachusetts General Laws 94C section 34 - unlawful possession of particular controlled substances. The respondent admitted to sufficient facts to warrant a finding of possession of a controlled substance; the respondent paid 300 dollars in court costs, and the case was continued to May 6, 1985. The charges were then dismissed. The service contends that, regardless of the ultimate dismissal of the charges, the respondent admitted sufficient facts to constitute a conviction for immigration purposes pursuant to the standards outlined by the Board in *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). In contrast, the respondent argues that the 1984 arrest and subsequent dismissal of the charges does not constitute a conviction for immigration purposes.

The immigration judge ruled that the Massachusetts state law under which the respondent was charged was equivalent in scope to the Federal First Offender Statute, and therefore, the dismissal of the charges without imposition of a penalty does not constitute a conviction for immigration purposes.

However, the issue of whether the respondent's 1984 arrest and subsequent dismissal of the charges is a conviction for immigration purposes is peripheral to the ultimate decision in this case. We need not decide the matter presently before us on

the basis of this issue. The respondent's 1986 conviction for trafficking in cocaine and his failure to pay child support are adverse factors of sufficient gravity to compel the requisite showing of counterbalancing unusual or outstanding equities. *Matter of Marin, supra*; *Matter of Buscemi, supra*. We find, upon our de novo review of the evidence of record, that the respondent's length of residence in this country for 21 years is an outstanding equity, but, it is, standing alone, insufficient to overcome the respondent's extremely serious criminal misconduct, therefore his request for a waiver of inadmissibility must be denied in the exercise of discretion.

We find merit to the Service's contention that the very serious nature of the respondent's criminal history compels a denial of relief from deportation in the exercise of discretion. In that regard, the record of proceedings in this case reveals that the respondent admitted to both selling and using cocaine from 1984 through his arrest in 1986. The respondent estimated to selling cocaine 15 to 20 times, at approximately 1,000 dollars per sale, in the six month period leading to his arrest.

In contrast to the adverse factors enumerated above, positive factors of record include the respondent's long residence in this country, and his continued financial support for his children. The respondent also testified that he periodically visits his children during the week or on weekends. The respondent provide financial support to another woman and her children with whom he began living subsequent to his release from prison. The respondent has been steadily employed by Hogan Tire Center since January 1987. His employment commenced as part of a work release program in prison. The respondent donates his time counseling persons with substance abuse problems. The respondent's parents have been lawful permanent residents since 1968.

The respondent's social worker, employer, brother, ex-girlfriend, and counselor testified on behalf of the respondent's application for a waiver of inadmissibility. They testified that he has been rehabilitated, that he enjoys a close, emotionally, supportive relationship with his family and children, that he is an honest and competent employee, and that he has been drug-free since his release from prison. In support of the grant of a waiver of deportability, the respondent contends on appeal that the immigration judge's decision was proper.

The respondent's sole outstanding equity is his length of residence in the United States. Nonetheless, this equity is outweighed by the extremely serious nature of the respondent's criminal history. We disagree with the relative weight assigned to the positive and adverse factors by the immigration judge in this case. The respondent has a history of criminal behavior involving controlled substances and is a convicted trafficker in cocaine. We cannot overemphasize the amount of crime and suffering precipitated by the use, purchase, and sale of illegal drugs in this country. The respondent's first involvement in the criminal justice system resulted from his failure to pay child support. This incident should have served as sufficient warning to the respondent that any subsequent violations of the law would jeopardize his continued presence in this country. Nonetheless, with monumental contempt for the criminal laws of this country, the respondent, by his own admission, repeatedly bought and sold cocaine. We cannot agree with the immigration judge that the respondent's extended residence, family ties, attestations of good moral character and integrity, and subsequent hardship to his family, is outweighed by the extremely serious nature of the respondent's criminal history.

The respondent does not merit relief from deportation in the exercise of discretion. *Matter of Edwards*, *supra*; *Matter of Marin*, *supra*. We recognize that the respondent's deportation

may cause emotional hardship to him and his family; however, the responsibility for this rests with the respondent himself.

Accordingly, the following order will be entered.

ORDER: The decision of the immigration judge is reversed, and the respondent is ordered deported to the Dominican Republic.

FURTHER ORDER: The respondent's motion to dismiss the Service brief as untimely filed is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A30 889 704 - Boston Date: Sep. 30 1993

In re: LUCAS PORFIRIO *BAEZ*-SOTO

DISSENTING OPINION: Mary Maguire Dunne, Board Member

I respectfully dissent.

The immigration judge carefully and fully weighed and balanced the adverse factors in this case against the favorable factors and found that the respondent had established that he should be granted discretionary relief from deportation. Without pointing to a single factual or legal error on the part of the immigration judge in reaching his decision, the majority simply substituted its judgment for his.

The sole factor that the majority seems to focus on is the nature of the conviction, a narcotics offense. Indeed, the majority's strong language about the use, purchase and sale of illegal drugs -- while true -- seems to be the basis for its decision. Quite simply, however, Congress has not seen fit to deny Section 212(c) discretionary relief to drug offenders per se. Rather, the entire record must be examined to determining whether or not relief should be granted. The immigration judge did examine the entire record in reaching his decision; the majority looks only at respondent's crime and abrogates its responsibility to balance the adverse and favorable factors. Finding no fault in the immigration judge's analysis, I would dismiss the Service's appeal.

Mary Maguire Dunne
Board Member

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge
Boston, Massachusetts

File No. A 30 889 704 June 16, 1989

In the Matter of	)	
	)	IN DEPORTATION
LUCAS PORFIRIO BAEZ-SOTO	)	PROCEEDINGS
	)	
Respondent	)	

CHARGE: I&N Act, Section 241(a)(11) - [convicted for a violation of a controlled substance].

APPLICATIONS: Waiver of inadmissibility under Section 212(c) of the Immigration and Nationality Act.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Manny Daskal, Esquire Four Faneuil Market Place Boston, Mass., 02109	Henry Hanley General Attorney Immigration and Naturalization Service J.F.K. Building, Government Center Boston, Mass., 02203

ORAL DECISION OF THE IMMIGRATION JUDGE

Pursuant to Section 242 of the Immigration and Nationality Act, an Order to Show Cause was issued charging respondent to be deportable under Section 241(a)(11) of the Immigration and Nationality Act, in that he was convicted of a violation of the Controlled Substance Act, in that he was convicted on October 14, 1986 for unlawful distribution of a controlled substance to wit cocaine in violation of Chapter 94(C), Section 32(A) of the Mass. General Laws (Exhibit 1).

Respondent, by and through counsel, admitted the truthfulness of the factual allegations, conceded deportability, and designated the Dominican Republic as the country of deportation. Based upon the admissions of counsel and in behalf of respondent, I find respondent is deportable on the charge contained in the Order to Show Cause to the Dominican Republic.

By way of relief from deportation, respondent applied for a waiver of the admissibility of the grounds of excludability under Section 212(a)(c) of the Immigration and Nationality Act.

The respondent, a 28 year old unmarried male, is a native and citizen of the Dominican Republic who was admitted as a lawful permanent resident on April 20, 1972, at New York, New York (Exhibit 4). Respondent has departed the United States approximately four times to visit family members in the Dominican Republic. Respondent's last departure was from November 16, 1985 to December 28, 1985. The duration of the absences were approximately one month.

Respondent's family ties in the United States consists of his parents who came to the United States in 1968. Respondent has two brothers and two sisters who are lawful permanent residents of the United States. Respondent testified he has a close

relationship with siblings and parents. He testified none of his siblings or parents are financially dependent on him for support.

Respondent is a father of two children who were born to Edna Hernandez, Kenia Giselle Baez, who was born on October 16, 1981, and Alvin Baez, who was born on April 9, 1984. Both children were born in Boston, Massachusetts. Respondent testified he has a close relationship with the two children.

Respondent testified that the children have been the recipients of welfare benefits for practically seven to eight years. Respondent also testified he had resided with Edna Hernandez during the period of time she was obtaining support for the children and housing benefits. Respondent testified he is concerned about the welfare of the children and he responds to their needs and provides them with counseling. He sees the children on weekends and times during the week.

Respondent testified he provides financial support to the children when he is financially able to do so and does give them some money. He testified he purchased approximately $300 worth of clothing for the children on or about October 26, 1988. Respondent was incarcerated from the time of his arrest on or about July 23, 1986 until released in October, 1988. He testified the children visited him on a monthly basis.

A complaint was filed on or about March 9, 1984, in District Court, West Roxbury Division in the City of Boston alleging respondent failed to support the child, Kenia from October 16, 1981 to the date of the complaint (Exhibit 14). At a hearing on July 8, 1983, respondent agreed to pay $65.50 a month for support and $34.00 on the arrearage of $1,089.50 effective as of July 15, 1983. Also, a notation contains that respondent made one payment. It also notes that the original complaint cannot be located. Subsequently, on December 29, 1989, a summons was issued for the respondent regarding the non-support of three children of Edna Hernandez. The third

child was listed as Gabriel Hernandez born April 4, 1975. Respondent testified that he attended a hearing on February 7, 1979, before the Child Support Unit along with Edna Hernandez and the representative of the Child Support Unit at which time an agreement was entered that he would pay $100 a week for the support of Kenia and Alvin and $10.00 a week for the arrearage of approximately $5,000 for the medical expenses regarding the birth of the children.

The respondent presented a document consisting of his pay stub reflecting deductions were being made of a total of $110 for child support (Exhibit 15). Respondent testified he's currently up-to-date on the present support payments. Respondent testified that when he appeared in Court on April 7, 1987, for adjudication of paternity, he was relieved of the payment, of the arrearages owed at the time (Exhibit 14).

The respondent testified he began living with Sandra Pena approximately one month before he was arrested in July, 1986. And he resumed that relationship after being released from prison on or about October 19, 1984. He testified he has three children but he's not the father of any of the three children. She resides in a three bedroom rented apartment with a monthly rent of $650. And respondent contributes $300 towards the payment of the rent and other additional funds for groceries. Respondent testified he believes she obtains financial assistance for the children but not any subsidies for the rental expenses.

Respondent testified he attended Brighton High School for approximately one year beginning in 1978 in the 11th grade. He subsequently obtained his general equivalency high school degree while in prison.

Respondent is now employed by the Hogan Tire Center as an alignment man since January 18, 1987. He testified he began his employment on a work release program while in the Halfway House. Respondent testified he's held various

employments in the past in the maintenance and cleaning field. During his period of employment, his average earnings would be approximately $300 to $350 a week. Respondent testified he's never filed Federal income tax returns. Respondent testified he does not suffer from any physical disability.

Respondent then testified he was arrested on or about July 23, 1986 and charged with possession with intent to sale cocaine. Respondent testified he purchased the drugs from a known source and he in turn was selling it to the people in the street. During a period of time he sold narcotics from mid-1985 until the time of his arrest earning approximately $3,200 consisting of approximately 15 to 20 sales with the lowest sale costing $800. Respondent testified he began the use of cocaine in 1984 because he was involved with the wrong crowd. He used it daily as needed approximately one, two times a day consisting of a "couple of lines". The expense to respondent of his habit cost him approximately one-half of his pay check.

Respondent also admitted the arrest in 1984, when he was charged with possession of a controlled substance, Class B, to wit, cocaine with intent to distribute on February 13, 1984, (Exhibit 12). On May 17, 1984, the charge was amended to possession of a controlled substance after admission to sufficient facts and the case was continued to May 16, 1985. Respondent was assessed $300 Court costs which he paid on the same date. On May 16, 1985, the charge was dismissed. Respondent testified he was on probation for two years and then the charge was dismissed.

Respondent testified during his period of incarceration he underwent mandatory drug counseling on a weekly basis with approximately 30 other participants. The group was led by other inmates and from persons outside the institution. Respondent underwent this program for approximately three months. He also underwent other programs involving narcotics

during his incarceration at the various other institutions at which he was incarcerated.

Subsequent to his release, he has been involved with the Peaceful Movement Committee, which is a substance abuse treatment and prevention program (Exhibit 7). The statement from the Peaceful Movement Committee, Inc., notes that respondent accepted the responsibility of his drug habit and has expressed remorse for his prior involvement and that he openly accepted his past mistake. And he has a strong attachment to his family and that it would be a severe loss to his family if he were to be deported. The statement notes that the author's opinion that respondent would not again be involved in his past mistake or take part in any illegal activities.

Respondent testified he is on parole until 1996. He continues to attend Narcotic Anonymous on a weekly basis in this community.

Respondent testified he has a new perspective on life and has seen the errors of his ways of being involved in the sale of drugs. He's undergoing a period of rehabilitation which he feels can only benefit him. He is remorseful of his past behavior. He deeply regrets the separation from his family during the period of his incarceration. He will be devastated if he were to be deported because of his close family ties in the United States.

Respondent testified he underwent a period of culture shock when he came to the United States because of the unfamiliarity of this new life in the United States.

Respondent testified he has been arrested on other occasions for traffic violations. Respondent testified he's involved in community work by volunteering his services and distributing food to the homeless while he was at the halfway house.

Respondent presented his Social Worker from Peaceful Movement who testified in behalf of the respondent. She testified she's been involved in counseling persons with substance abuse problems. She has spoken to respondent over an extended period of time to determine whether or not he would be a recidivist and to learn why respondent would be involved in such activities. She believes it's caused by peer pressure and family pressure. She testified respondent has no problem at the present time, not involved in any present use of drugs by the respondent. Respondent has been cooperative and open and has spoke openly during the sessions. The witness testified the recidivist rate in the general population for persons with the same problems as the respondent is approximately 50 percent. The witness testified she has had no contact with members of respondent's family, but respondent expressed to her his concern for the children and wanted to provide more for the children. She believes that respondent's rehabilitation is sincere and honest on his part.

Respondent's manager from his place of employment testified in behalf of the respondent. He met the respondent in approximately January, 1988, when respondent appeared to answer an ad in the newspaper. He believes respondent is a competent employee who is a dedicated, cooperative and respectful person. He has had no problems with the respondent during his period of employment and considers the respondent to be a nice person.

Respondent presented another witness, Sharon Jones, who helped the respondent during the period of time he was in the Halfway House and under a program in July, 1980 until October, 1988. She testified that she is the Director of the Temporary Housing Program and respondent caused her no concern during the period of time he was there. He was well-behaved and returned promptly on the furloughs granted to him.

Respondent's brother, Hector Baez, testified in behalf of the respondent. He testified he came to the United States in 1972, and all the family ties are in the United States. They are a close family and have a good relationship with each other. The witness testified he and his family members visited respondent on a regular basis while incarcerated. The witness testified he had no knowledge or was aware of any use of cocaine by the respondent. The witness testified respondent treats his family well and is a dependable and helpful person. If he were to be deported, it would cause a separation to the family and the family had never been separated previously.

Edna Hernandez testified as a witness in behalf of the respondent. She testified she has known the respondent for approximately 10 years and lived with him for approximately seven years until 1985. The witness testified she never reported to the Welfare Agency that respondent was residing with her. She never has been married to the respondent. She testified she never brought any action against the respondent for support of the children but the action was brought by the Welfare Agency. The witness testified she has two children by the respondent but a total of three. She testified that the respondent is close to the children and continues to see them. She testified when Alvin had an accident and broke his leg, respondent cared for the child. He sees the children weekly and at times during the week. He purchases items for the children. He does purchase some items for the children but he has never provided any money. She testified the children visited the respondent approximately once or twice a month while he was in prison. She believes that if the respondent were deported, it would have an affect on the children because of their close relationship to him.

The respondent submitted a number of documents in support of his application of respondent's prior employment; his participation at the Haley House that serves homeless men;

character references regarding the respondent should be allowed to remain in the United States as he has paid for his mistake; his high school equivalency certificate and his courses and grades (Exhibit 7). Respondent also attached a statement from his parole board dated November 21, 1988, noting respondent was granted parole and the conditions of release of his current employment and residence; supervision for drugs; and participation in a substance abuse counseling program. The statement also notes the respondent's parole supervision will continue until September 2, 1995.

Section 212(c) of the Act provides in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily not under an order of deportation, and who are returning to a lawful unrelinquished domicile for seven consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds to exclusion enumerated in Section 212(a) of the Act. The grounds specified include an alien who is convicted of a drug offense, as set forth in Section 212(a)(23) of the Act. Section 212(c) of the Act has been interpreted as affording relief from deportation on the basis of such drug offense regardless of whether the respondent in deportation proceedings departed from the United States following the act which had rendered him deportable. *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976). Respondent has established statutory eligibility for relief under Section 212(c) of the Act on the basis on an unrelinquished domicile of over 17 years.

Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Respondent bears the burden to demonstrate his application merits a favorable consideration. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

In determining when a respondent's application for relief under Section 212(c) merits a favorable exercise of discretion, the Immigration Judge must balance the adverse factor evidencing an alien's undesirabilites as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of the application appears in the best interest of this country. *Matter of Marin, supra.*

The adverse factors are respondent's conviction involving cocaine and the neglect of support of his children who were born of wedlock.

Counsel for the respondent has submitted briefs contending that the offense, his offense which was charged on February 13, 1984, possession of a Class B substance, cocaine with intent to distribute, does not constitute a conviction. After respondent's admission to sufficient facts on May 17, 1984, the complaint was amended to read possession of a controlled substance in "Class B". The case was continued to May 16, 1985 and subsequently dismissed on May 16, 1985. Counsel contends that this is not a conviction as set forth under the standard of *Matter of Ozkok*, Int. Dec. 3044 (BIA 1988). In the *Matter of Ozkok, supra*, the Board of Immigration Appeals set forth the elements needed to establish whether or not a conviction exists for Immigration purposes. There must be a finding the alien is guilty or enter a plea of guilty on nolo contendere or has admitted sufficient facts that warrant a finding of guilty; the Judge has ordered some form of punishment, penalty, or restraint on a person's liberty to be imposed, and a judgement or adjudication of guilty may be entered if a person violates the terms of his probation or fails to comply with the requirements of the Court's order, without the availability of further proceedings regarding his guilt or innocence of the original charge.

Counsel for the respondent attached to the supplemental brief the pertinent Massachusetts General Laws, Chapter 94(C), Section 34. It notes that one is not previously convicted of an offense related to drugs after the expiration and under conditions that the Court or probation could have the Court dismiss the proceedings and an order sealing the records relating to the arrest, indictment, conviction, probation, continuance or discharge. Counsel argues in his brief that no punishment by way of probation was ordered by the Court. But the pertinent statute notes one does not violate any conditions of said continuance or the probation. And one must infer that when the Court continues a case, certain conditions are carried along with that continuance. But as to whether or not this constitutes a conviction under the *Ozkok*, *supra*, standard, I would find this is a State First Offender Statute which is comparable to the Federal First Offender Statute. It can only be given one time and for only to those who have had no previous convictions.

It is noted that the respondent's conviction involved the distribution of cocaine. Again, this is a serious offense. Respondent was incarcerated for a substantial period of time. There is no evidence that he has received any disciplinary action or reprimands while incarcerated. He underwent rehabilitation programs regarding narcotics. It is also noted that there has been no evidence presented of any violations of his parole.

Another adverse factor is the respondent's non-support of his two children born out of his relationship with Edna Hernandez. Respondent's testimony is that the prior outstanding arrearages have been discharged so that he is no longer obligated to pay them. The respondent had presented evidence that he is making the payments pursuant to an agreement entered with the State agency overseeing the children. His testimony is that he is current in his payments.

Respondent has a number of family ties in the United States along with his residence in the United States which began when he was approximately 12 years of age. His young adult life into his adult life has been spent here in the United States. Respondent's employment history has been consistent without any substantial periods of unemployment.

His testimony and that of Edna Hernandez and other family members is that respondent has a close relationship with his two children. Prior to the entry of the agreement and respondent's financial support of the children, it does not appear that the children suffered financially. Respondent is now contributing financial support to the children which relieves the State from providing this amount. There would now be a financial and emotional hardship to his two children. Also, there would be an emotional hardship to the respondent's family if he were to be deported. No evidence has been presented that any of respondent's family members are financially dependent on him for support.

Respondent then has presented evidence of his involvement with community affairs during the period of time he was in the Halfway House. He has presented evidence of rehabilitation through various programs and witnesses. He presented a number of letters from family members that respondent should be given an opportunity to demonstrate that he has been rehabilitated and consider him to be a responsible person. He also presented letters from his employment. Respondent expressed remorse for his past criminal behavior. There's no evidence since his release that he's been involved in any other criminal matters.

Based on the favorable factors of extended residence, family ties, the number of letters attesting to the respondent's rehabilitation and no longer involved in any criminal matter,

and a separation that would be caused to his children and family, I'll grant the application as a matter of discretion.

ORDER

IT IS ORDERED that respondent's application for relief under Section 212(c) of the Act insofar as it relates to the conviction as set forth in the Order to Show Cause, is hereby granted.

IT IS FURTHER ORDERED that the proceeding be terminated.

BILLINO W. D'AMBROSIO
Immigration Judge

Article III Of The United States Constitution

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

Section 106 of the Immigration and Nationality Act,
8 U.S.C. § 1105a

(a) Exclusiveness of procedure. The procedure prescribed by, and all the provisions of chapter 158 of title 28, United States Code, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that --

(1) a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order;

(2) Venue; the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation. The action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs, or unless the alien is convicted of an aggravated felony, in which case the Service shall not

stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

(4) Determination upon administrative record. Except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo. Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

(6) Whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order;

(7) Challenger of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of

motion; dismissal of indictment upon invalidity of order; appeal. If the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provision of section 2201 of title 28, United States Code. Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

(8) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien. Nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after

the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(9) Typewritten record and briefs. It shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(10) Habeas corpus. Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings. Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure form United States; disclosure of prior judicial proceedings. An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review of for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding

took place. No petition for review of for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceedings, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.